IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 451 of 2001
with
CRIMINAL APPEAL No. 465 of 2001
with
CRIMINAL APPEAL No. 809 of 2001

For Approval and Signature:
HONOURABLE MR.JUSTICE ANIL R. DAVE
HONOURABLE MR.JUSTICE H.B.ANTANI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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MANIYABHAI KOYABHAI NAYAK - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :
MS SADHANA SAGAR for Appellant(s) : 1,
MR LR POOJARI, ADDL. PUBLIC PROSECUTOR for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE ANIL R. DAVE

and

HONOURABLE MR.JUSTICE H.B.ANTANI

Date : 21/06/2006

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE ANIL R. DAVE)

These appeals have been filed against the judgment and order dated 2nd May, 2001 passed in Sessions Case No. 187 of 2000 by the Addl. Sessions Judge, Dist. Panchmahals at Godhra. As all these 3 appeals are arising out of a common sessions case, at the request of the learned advocates appearing for the parties, they have been heard and decided together.

2. By virtue of the impugned judgment, the appellants-accused have been convicted under the provisions of Section 396 of the Indian Penal Code (hereinafter referred to as “IPC”) and sentenced to undergo 10 years rigorous imprisonment with fine of Rs. 500, in default 15 days' simple imprisonment.

3. The facts giving rise to present Case in a nutshell, are as under:

3.1. On 4th February, 2000, Arjunbhai Zalabhai was sleeping outside his house along with his father Zalabhai Shakerbhai. All of a sudden he was awakend from his sleep as he heard his father shouting. Upon getting up he saw two persons standing near his cot and one of them gave a blow of 'dafna' (a small thick stick) on his face and he was told to keep quite and sleep. He also saw that one person was standing near his father's cot and other 5-7 persons were moving in the verandah of the house. One of the persons went near his wife, who was sleeping in another cot. Three persons broken open a door of his

house and entered the house. Within half an hour he heard noise of breaking things in his house and thereafter all those persons fled from the scene. He felt that, in all, there were 8-10 persons. Due to insufficient light, he could only observe that those persons had put on T-shirts and shorts and everybody had 'dafna' or some other weapon in their hands. After the persons had left the house, the complainant started shouting with other family members and thereupon his neighbours started gathering. The complainant told the neighbours about what had happened and thereafter with beating of drum and by making noise they invited attention of the residents of the village. Upon making such noise, residents of the village gathered and they went towards 'aakha dam' and tried to find out those persons. In spite of making efforts for 2-3 hrs., they could not trace anybody. When the complainant came home, he found that his household articles had been ransacked and the ornaments had been looted. His father and mother had been seriously injured and therefore they had been taken to a dispensary at Shehra in the morning around 5'clock. During the course of treatment mother of the complainant, Champaben, expired. The complainant found that a sum of Rs. 27,000 and approximately 7 kg. of silver worth Rs. 49,000 had been looted. Thus, in all, cash and silver ornaments worth Rs. 76,000/- had been looted from the house.

3.2. The complainant filed an FIR at Shehra Police

Station, which had been registered at C.R. No. 16/2000. The offence had been registered under the provisions of sections 395 and 397 of the IPC, but as mother of the complainant had died while during treatment, section 396 had been added subsequently.

3.3. The charge had been framed (Ex. 2). The accused did not plead guilty and therefore they were put to trial. In the course of trial, the following witnesses had been examined by the prosecution.

1) Arjunabhai, the complainant, P.W. No. 1 (Ex. 8)
2) FulsinhLalbhai, P.W. No. 2 (Ex. 10)
3) Fatehsinh Laxmanbhai, P.W. No. 3 (Ex. 13)
4) Gulabsinh Chhatrasinh Baria, P.W. No. 4 (Ex. 15)
5) Laxmanbhai, P.W. No. 5 (Ex. 17)
6) Fatesinh Prabhatsinh, P.W. No. 6 (Ex. 19)
7) Sureshkumar, P.W. No. 7 (Ex. 20)
8) Manharbhai Vallabhdas Soni, P.W. No. 8 (Ex. 21)
9) Champaklal, P.W. No. 9 (Ex. 24)
10) Dhuliben Bharatsinh, P.W. No. 10 (Ex. 25)
11) Bharatsinh Zala, P.W. No. 11 (Ex. 26)
12) Motibhai Chhaganbhai, P.W. No. 12 (Ex. 27)
13) Aswinbhai Ratilal, P.W. No. 13 (Ex. 29)
14) Shantaben Srjunsinh, P.W. No. 14 (Ex. 30)
15) Zalabhai, P.W. No. 15 (Ex. 31)
16) Bhupendrasinh, P.W. No. 16 (Ex. 32)
17) Adbul Majid, P.W. No. 17 (Ex. 34)
18) Balwantsinh, P.W. No. 18 (Ex. 39)
19) Makabhai, P.W. No. 19 (Ex. 40)
20) Dr. Sutapa, P.W. No. 20 (Ex. 41)
21) Chandumal, P.W. No. 21 (Ex. 44)

22)Chhaganbhai, P.W. No. 22 (Ex. 45)
23)Jordan Gadvi, P.W. No. 23 (Ex. 46)
24)Bhagwanbhai, P.W. No. 24 (Ex. 54)

3.4. The following important documents had also been examined in the court of the trial:

1) Complaint (Ex. 9)
2) Panchnama (Exs. 11, 12 & 14)
3) Inquest Panchnama (Ex. 16)
4) Panchnama (Ex. 18)
5) Panchnama (Ex. 28)
6) Panchnama (Ex. 33)
7) Post-mortem Notes (Ex. 43)
8) MLC Certificates (Exs. 51, 57-69)
9) Medical Report (Exs. 49 & 50)
10) Medical Certificate (Ex. 56)

4. Upon considering the deposition of the prosecution witnesses and upon perusal of the documentary evidence, the trial court came to the conclusion that the accused were guilty of the offences alleged against them under the provisions of section 396 of the IPC.

5. The trial court has come to the conclusion that the accused are guilty of the offences referred to hereinabove mainly on the basis of the ocular evidence of the complainant and his family members, who had seen some of the accused. It is pertinent to note that the trial court has given due weightage to the evidence of the complainant and his family

members, at whose residence the dacoity had been committed by the accused. Mother of the complainant, Champaben, had recognized accused No. 3 and upon knowing that accused No. 3, Fatesinh Dhabi was going to beat her, she had named him and had told him not to behave in such a manner. She begged him not to injure her. Moreover, the complainant, Arjunsinh (PW No. 1), his wife Shantaben (PW No. 14) and his father Zalabhai Shankarbhai (PW No. 15) had also requested some of the accused not to hurt them as they were belonging to the same village and were living in the neighbourhood. The trial court found that there was dim but sufficient light to recognize the persons, who were known to the complainant and his family members. For the aforesaid reasons, oral evidence of the witnesses was believed by the trial court.

6. It is also pertinent to note that the stolen ornaments had also been recovered from the accused. The trial court has relied upon the panchnama, whereby the ornaments like silver 'hansadi' (necklace) had been recovered. The said ornaments had been identified by the family members of the complainant. It is also pertinent to note that goldsmith Shri Champaklal Soni (PW No. 9), who had made the said ornaments, was shown the ornaments, and he had deposed to the effect that the said ornaments had been made by him for the father of the complainant, namely, Shri Zalabhai Shankarbhai (PW No. 15).

7. On the basis of the aforesaid evidence, the trial court has come to the conclusion that the accused are guilty of the offences alleged against them and, therefore, they have been convicted and sentenced as stated hereinabove.

8. Being aggrieved by the aforesaid judgment and order, the appellants-accused have approached this court by way of these three separate appeals. One of the accused, namely, Maniabhai, has been absconding after the trial was over, when he had been enlarged on bail.

9. Learned advocate Ms. Sadhana Sagar appearing for the appellants-accused has challenged validity of the judgment and order mainly on the following grounds:

10. The accused were not named in the FIR though they were known to the complainant and his family members and for the first time their names were revealed when evidence was led by the complainant and other family members.

11. According to her, the trial court ought not to have considered the circumstantial evidence with regard to recovery of ornaments especially when eye witnesses were available in the instant case. If the circumstantial evidence had to be considered, the trial court ought to have seen that the chain of events had not been completed and therefore the accused had been wrongly convicted.

12. Learned advocate Ms. Sagar has submitted that the medical evidence was not supporting the deposition of the complainant.

13. She has further submitted that sec. 395 of the IPC could not have been invoked in view of the fact that the number of accused in the instant case are only four and not five as contemplated under sec. 395 of the IPC.

14. In view of the fact that sec. 114 had been invoked, accused No. 4 could not have been held guilty and if he had been held not guilty, all the accused ought to have been held not guilty.

15. According to her, the entire muddamal, namely, all ornaments had not been recovered and, therefore, the offence alleged against the accused has not been established.

16. No test identification parade had been conducted and, therefore, no case was made out by the prosecution for conviction of the accused.

17. The learned advocate has submitted that no fingerprints were taken from the scene of offence and clothes of the accused had not been sent to the Forensic Science Laboratory for necessary examination and because of the said defect in the investigation, the accused could not have been convicted.

18. Learned advocate Ms. Sadhana Sagar has cited the following judgments in support of her submissions:

(1)George & Ors. v. Stte of Kerala & Anr., 1998 SCC (Criminal) 1232
(2)Harish Natvarlal Mistry & Ors. Etc. etc. v. State of Gujarat, 1993(1) CRIMES 451.
(3)Karam Singh alias Karmu v. The State by the Inspecto of CBCID, Madras, 1992 CRI.L.J. 2333.
(4)Rameshwar Singh v. State of Jammu & Kashmir, 1972 CRI.L.J. 15
(5)Mohanlal Gangaram Gehani v. State of Maharashtra, AIR 1982 SC 839.
(6)Subhash & Shiv Shankar v. State of U.P., AIR 1987 SC 1222

19. On the other hand, learned APP Shri Poojari has submitted that the judgment and order passed by the learned trial Judge is so sound that no interference is called for by this court. According to him, the link connecting the accused with the offence and commission of the crime has been duly established. He has further submitted that looking to the gravity of the offence and the evidence on record, no sympathy should be shown to the accused especially when, in the course of dacoity, one woman has already lost her life. He has, therefore, supported the judgment and order of conviction and sentence passed by the learned Addl. Sessions Judge.

20. Learned APP Shri Poojari has relied upon the following judgments to substantiate his submissions:

(1)Mohan Singh & anr. v. State of Punjab, AIR 1963 SC 174
(2)Nar Singh & anr. v. State of U.P., AIR 1954 SC 457.
(3)Ramu Gope & ors. v. State of Bihar, AIR 1969 SC 689.
(4)Kanta Prasad & anr. v. Delhi Administration, AIR 1958 SC 350.
(5)Sampt Tatyada Shinde v. State of Maharashtra, AIR 1974 SC 791.
(6)Earabhadrappa v. State of Karnataka, AIR 1983 SC 446.

21. We have heard the learned advocates at length and have also perused the record and proceedings pertaining to the case. Upon hearing the learned advocates and upon perusal of the evidence on record, we are of the view that the judgment delivered by the trial court does not call for any interference as it is based on cogent and convincing reasons. The arguments advanced by learned advocate Ms. Sagar do not appear to be correct and convincing. We have examined her submissions in detail and have also examined the entire record from the points of view suggested by her. In spite of the said fact, we cold not find any fault in the judgment delivered by the trial court and, therefore, we are inclined to uphold the judgment for the following reasons:

22. It has been submitted with great emphasis by learned advocate Ms. Sagar that the complainant did

not reveal names of the accused in the FIR or in the course of investigation, but for the first time while deposing in the court, the complainant and his family members had revealed names of the accused while identifying the accused. According to her, by not revealing names in the FIR, it cannot be said that the accused were the persons, who had committed the offence alleged against them.

23. Because of the peculiar facts of the case, we are not in agreement with the aforesaid submission made by the learned advocate for the reason that in the deposition, the complainant (PW No. 1) has stated that though the complainant and his family members knew the accused, they did not dare to name them in the FIR as well as before the police authorities in the course of the investigation for the reason that all the accused were headstrong persons and while committing the offence they had given serious threats to the complainant and his other family members that if their names were revealed to anyone, they would be murdered.

24. The mother of the complainant, Champaben, who was brutally beaten at the time when the offence was committed, ultimately died while she was undergoing treatment. It is pertinent to note that Champaben, a lady aged approximately 60 years, who had clearly recognized accused No. 3 at the time when the offence was committed, had requested accused No. 3 not to beat her. The said fact was known to complainant Arjunbhai (PW No. 1). The complainant in his

deposition has stated that he had heard his mother, late Champaben, begging for mercy, but she was beaten brutally by accused No. 3 and even her head was twisted to such an extent that she became unconscious on the spot. After giving such a treatment to Champaben, accused No. 3 had given threat to complainant, Arjunbhai (PW No. 1) that if the complainant would reveal name of any of the accused, the complainant would also be killed. The threat given to the complainant was so serious and real that the complainant could not dare to reveal name of accused No. 3 or other accused in the FIR. One can very well understand the plight of a person, who had seen his mother being brutally beaten , which ultimately resulted in her death. The said fact has been clearly denoted in his deposition. It has been also supported by his other family members, namely, Bharatsinh (PW No. 11), Zalabhai (PW No. 15), Shantaben (PW No. 14) and Duliben (PW No. 10). We see no reason to disbelieve the aforesaid eye witnesses who have not only supported the complainant Arjunbhai (PW No. 1) but have also deposed that because of the threats given by accused No. 3 and other persons, they did not think it proper to reveal names of the accused before the police authorities. It is pertinent to note that only when the accused had been arrested and when the aforesaid eye witnesses were confident that they would not be released by police and when they were in the court of law, they felt secured and thereafter they revealed names of the accused.

25. Looking to the peculiar facts and circumstances of the case, in our opinion, the behaviour of the complainant and other eye witnesses of his family cannot be said to be unreasonable or unbelievable, which would give reason for the trial court or for us to disbelieve them. It is also pertinent to note that mere omission to give names of the accused in the FIR would not constrain this court to brush aside other cogent and convincing reasons given by the learned trial Judge which implicates the accused in the offence. Thus, we do not find any substance in the first submission made by the learned advocate for the appellants-accused.

26. Another submission of the learned advocate for the appellants-accused is that as eye witnesses were available, the trial court should not have considerd the circumstantial evidence and the trial court should have relied upon only the eye witnesses and the deposition of the eye witnesses. We do not find any substance in this submission of the learned advocate for the reason that the circumstantial evidence like recovery of ornaments from the accused was also available. There was no reason for the trial court to brush aside the circumstantial evidence, which is an important piece of evidence. It is pertinent to note that the ornaments, which had been recovered from the accused, were duly identified by the complainant and his family members, who owned the ornaments. Moreover, goldsmith Champaklal Soni (PW No. 9), who had made the said ornaments for Zalabhai (PW No. 15), had also deposed that the said

ornaments had been made by the said witness for Zalabhai and his family members. In a small village, where the goldsmith may not be having plenty of work and where the relations among residents of the village are reasonably cordial, we do not see any reason for the goldsmith to make any mistake while confirming that he had made the ornaments, which had been recovered from the accused, for Zalabhai (PW No. 15) and his family members. This important piece of circumstantial evidence has been rightly considered by the trial court along with evidence of the eye witnesses. Simply because the eye witnesses are available, the trial court cannot be expected to ignore the circumstantial evidence or to decide something in isolation of circumstantial evidence. The function of the court is to examine the entire evidence available to it in its true perspective and to come to a particular conclusion. In our opinion, after considering the oral as well as circumstantial evidence, the trial court has rightly come to the conclusion with regard to involvement of the accused in the offence. For the aforesaid reason, we do not find any substance in the second submission made by the learned advocate.

27. It has been submitted by the learned advocate that there is a variance between the medical evidence and the evidence given by the eye witnesses. We do not find any substance in the said submission also. Complainant Arjunbhai (PW No. 1) and his father Zalabhai (PW No. 15) have stated in their deposition

that the accused were having 'dafna' and other weapons with them. It has been specifically stated by Zalabhai (PW No. 15) an injured witness as well as by the complainant that the accused had given blows with 'dafna' to them as well as to Champaben, mother of the complainant, who ultimately died because of the injuries inflicted upon her. Thus, there is ocular evidence to the effect that the accused were having 'dafna' and with 'dafna' they had given blows to the complainant and his family members including Champaben, who died later as a result of the injuries suffered.

28. If one looks at the medical evidence which was available before the trial court, it is clear that the blows, which had been inflicted upon deceased Champaben, were given by a hard and blunt substance. The Doctor had opined that the injuries which late Champaben had, could have been inflicted by a wooden stick. Dr. Sutapa (PW No. 20) had further stated that the injuries which had been caused to late Champaben were sufficient in the ordinary circumstances to cause death of the victim. Thus, the medical evidence supports the version given by the eye witnesses. Thus, the submission that there is a variance between ocular evidence and medical evidence is far from truth.

29. The submission made by learned advocate Ms. Sagar that sec.395 could not have been invoked because there are only four accused in the criminal

case on hand is not correct. If one looks at the charge, it is very clear that in addition to the four persons who had been charged with the offence, some other unidentified persons were also involved in the said offence. Upon perusal of the charge sheet, it is clear that five more persons have been named in the charge sheet as having been involved in the offence, but as they were absconding, the charge was not framed against them. Thus, the charge sheet and the charge clearly reveal that more than 5 persons were involved in commission of the crime. Moreover, evidence of the complainant Arjunbhai (PW No. 1), Zalabhai (PW No. 15), Shantaben (PW No. 14) also reveal that approximately 8-10 persons were present at the time when the offence was committed. Thus, submission of the learned advocate that ingredients of sec. 395 have not been fulfilled because of less number of accused is not correct. We, therefore, do not agree with the said submission made by the learned advocate.

30. So far as the submission with regard to acquittal of accused No. 4 is concerned, we are of the view that submission of the learned advocate on that count is also not correct. It has been submitted by the learned advocate that sec. 114 of the IPC had been invoked at a later stage and, therefore, by acquittal of even one of the accused, all other accused ought to have been acquitted, cannot be said to be a sound submission. Simply because evidence was not forthcoming, accused No. 4 had been acquitted, whereas sufficient evidence,

ocular as well as circumstantial, was available before the trial court for conviction of other accused and, therefore, accused Nos. 1, 2 and 3 have been rightly convicted of the offences alleged against them. We, therefore, do not find any substance in the said submission made by the learned advocate.

31. It has been thereafter submitted by the learned advocate that as all ornaments, which had been stolen, had not been recovered from the accused, the conviction was not proper. We are not in agreement with the said submission. As observed hereinabove, the ornaments which had been recovered from the accused had been duly identified by the complainant and his family members. Moreover, the goldsmith had also identified the said ornaments as ornaments made by him for Zalabhai (PW No. 15), who is father of the complainant. Even if some of the ornaments could not be recovered from the accused, it cannot be said that the accused are not guilty of the offences alleged to have been committed by them. In our opinion, recovery of several ornaments from the accused is sufficient to establish involvement of the accused in the offence. We, therefore, do not agree with the aforesaid submission made by the learned advocate.

32. It has been forcefully submitted by learned advocate Ms. Sagar that no test identification parade was held and in absence of the test identification parade, the accused could not have been convicted. We do not agree with the said submission also. In

the instant case, the accused were known to the complainant and his family members. In fact, there is ample evidence to show that accused No. 3 Fatesinh was specifically identified by mother of the complainant, Champaben and the said fact was made known to everyone at that time. If the accused were known to the eye witnesses, it was not necessary to conduct a test identification parade. As the accused were known to the complainant and his family members, we are of the view that test identification parade was not required. We, therefore, do not agree with the said submission of the learned advocate.

33. Lastly, it has been submitted by the learned advocate appearing for the appellants-accused that fingerprints had not been taken from the scene of offence so as to implicate the accused and clothes of the accused as well as the deceased had not been sent to FSL for detailed analysis. In our opinion, the said submission is without any merit for the reason that there is sufficient ocular as well as circumstantial evidence to implicate the accused in the offence. If there are sufficient number of eye witnesses who had identified the accused at the time when the offence had been committed and when the ornaments, which had been looted, had been recovered from the accused and when the recovery was beyond any doubt, we do not see any reason for the prosecution to send clothes of the accused or the deceased to FSL for further medical analysis. We, therefore, do not accept the said submission of the learned advocate also.

34. We have considered the judgments which had been cited by the learned advocates. We do not dispute the ratio laid down in the said judgments. However, looking to the facts and circumstances of the case, in our opinion, the said judgments would not help the appellants-accused.

35. For the aforesaid reasons, we are in agreement with the order of conviction and sentence passed by the trial court. We accordingly uphold the judgement and order dated 2.5.2001 passed by the learned Additional Sessions Judge in Sessions Case No. 187/2000. The mudamal articles is to be destroyed and given to the owner as per the order passed by learned Sessions judge after the appeal period is over. The appeals are therefore dismissed. It is pertinent to note that one of the accused, namely, Maniyabhai Koyabhai Nayak, is absconding after being enlarged on temporary bail. We are sure that the authorities shall do the needful to procure his presence so as to make him undergo the remaining sentence.

The appeals are disposed of accordingly.

(Anil R. Dave, J.)

(hn) (H.B. Antani, J.)